In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-853

NORMA GERACI, EXECUTRIX OF THE ESTATE OF ANTHONY GERACI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question raised by the petition is whether the court below correctly held that the failure to file a federal estate tax return within the prescribed time limits was not "due to reasonable cause."

Anthony Geraci died on March 27, 1967, leaving a gross estate of more than $375,000. Under Section 6075 of the Internal Revenue Code of 1954, the federal estate tax return was due to be filed 15 months later, on or before June 27, 1968. The return, however, was not filed until August 28, 1968. Accordingly, the Commissioner assessed a 15 percent addition to tax, under Section 6651(a) of the Code, which provides for the addition to tax unless the failure to timely file "is due to reasonable cause and not due to willful neglect * * *." The Tax Court found that reasonable cause for the late filing of the return did not exist, and sustained the imposition of the addition to tax (Pet. App. A 7-12). The court of appeals affirmed *per curiam* (Pet. App. B 13-16).

Petitioners argue (Pet. 4) that the executrix had established reasonable cause as a matter of law because she relied on the attorney for the estate to prepare the proper tax returns for her and to ensure that they were filed on time. There is, however, no rule that, as a matter of law, reliance on an attorney or accountant to file tax returns constitutes reasonable cause, if the returns are not timely filed because of the attorney's or accountant's negligence. See 10 Mertens, *Law of Federal Income Taxation*, § 55.27, pp. 208-209. (Rev., 1970). Rather, as the Tax Court correctly held (Pet. App. A 9), the existence of reasonable cause is a question of fact to be determined from all the circumstances in a particular case. *Estate of Duttenhofer* v. *Commissioner*, 49 T.C. 200, 204, affirmed, 410 F.2d 302 (C.A. 6); *Estate of Mayer* v. *Commissioner*, 43 T.C. 403, affirmed *per curiam*, 351 F.2d 617 (C.A. 2), certiorari denied, 383 U.S. 935. Here, the record indicates that the executrix engaged an attorney and never discharged her personal obligation of ascertaining when the federal estate tax return was due to be filed. Under these circumstances, the courts below were justified in imposing the addition to tax.

In support of their argument that reliance on an attorney established reasonable cause as a matter of law, petitioners cite *In re Fisk's Estate*, 203 F.2d 358 (C.A. 6) (Pet. 4). However, in *Estate of Duttenhofer* v. *Commissioner*, 410 F. 2d 302, the Sixth Circuit explained the basis of its decision in *In re Fisk's Estate* as follows:

> In *Fisk* * * * a penalty was assessed for an estate tax return which was mailed on the last day allowed by the statute but was received one day late. This court reversed, holding that the delay there involved was an innocent error made despite reasonable care. A five-month delay does not appear to us to present a comparable situation.

The two-month delay here thus cannot be brought within the rationale of that case.

Hatfried, Inc. v. *Commissioner,* 162 F.2d 628 (C.A. 3), cited by petitioners (Pet. 4) is similarly inapposite. There, the Commissioner sought to impose an addition to tax on a corporation for failure to file on time. The corporation had filed a corporate tax return disclosing all essential information, but had not filed a personal holding company tax return because its accountant erroneously believed that it was not required to do so. Under those circumstances, the court concluded that the taxpayer's reliance on professional advice was consistent with ordinary business care and prudence and that the penalty should not be imposed. In contrast, there was no question in this case whether an estate tax return needed to be filed, nor was there any technical question of tax law involved upon which a lay executor might properly rely on professional advice.

As the Tax Court pointed out (Pet. App. A 9-10), the executrix had an affirmative duty to ascertain the nature of her responsibilities as such and to take appropriate steps to see that those responsibilities were discharged. *Estate of Lammerts* v. *Commissioner,* 54 T.C. 420, 446, affirmed in part and remanded, 456 F.2d 681 (C.A. 2); *Ferrando* v. *United States,* 245 F.2d 582, 587 (C.A. 9). The executrix had the burden of proving that

her conduct met the requisite standards of "ordinary business care and prudence." Treasury Regulations, Section 301.6651-1(c)(1). Since there is nothing to indicate that the executrix took any positive actions beyond appointing an attorney, the courts below correctly held that the executrix had not shown that she had reasonable cause for the late filing of the estate tax return.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.